The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK B. LITTLEJOHN, GEORGANNE SHIRK
and ALBERT D. JOHNS

Appeal No. 2005-2472
Application No. 09/978,484

ON BRIEF

Before KIMLIN, PAK and JEFFREY T. SMITH, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-6, 9-38, 50-86, 108 and 109. Claims 1 and 109 are illustrative:

1. A rigid and strong deep dish disposable container prepared from a radially scored, substantially planar paperboard blank, the container having a substantially planar bottom portion, an upwardly extending sidewall portion and an outwardly extending flange portion, at least one of said upwardly extending sidewall portions and said outwardly extending flange portions being provided with a plurality of circumferentially spaced radially extending densified

regions formed from a plurality of paperboard layers reformed into substantially integrated fibrous structures generally inseparable into their constituent layers having a thickness generally equal to adjacent areas of the sidewall or flange portions, said deep dish disposable container being provided with a height to diameter ratio of from about 0.1 to about 0.16 and a characteristic flange width to diameter ratio of at least about 0.04, wherein said densified regions extend over a profile distance corresponding to at least a portion of the length of the scores of the paperboard blank from which said container is formed, wherein said radially scored paperboard blank has from about 60 to about 90 radial scores and the deep dish container being further characterized by an SSI Rigidity of at least 500 rams at 0.5 inch deflection.

109. A rigid and strong deep dish disposable container prepared from a radially scored, substantially planar paperboard blank, the container having a substantially planar bottom portion, an upwardly extending sidewall portion and an outwardly extending flange portion, at least one of said upwardly extending sidewall portions and said outwardly extending flange portions being provided with a plurality of circumferentially spaced radially extending densified regions formed from a plurality of paperboard layers reformed into substantially integrated fibrous structures generally inseparable into their constituent layers having a thickness generally equal to adjacent areas of the sidewall or flange portions, said deep dish disposable container being provided with a height to diameter ratio of from about 0.1 to about 0.16 and a characteristic flange width to diameter ratio of at least about 0.04, wherein said densified regions extend over a profile distance corresponding to at least a portion of the length of the scores of the paperboard blank from which said container is formed, wherein said radially scored paperboard blank has from about 60 to about 90 radial scores.

The examiner relies upon the following references as evidence of obviousness:

Marx et al. (Marx)	4,721,499	Jan. 26, 1988
Sandstrom et al. (Sandstrom)	5,876,815	Mar. 2, 1999

Appellants' claimed invention is directed to a deep dish disposable container for food having a relatively large central planar portion as a plate and a relatively high sidewall. According to appellants' specification, "[t]he inventive articles are particularly useful for containing food including components that tend to be wet or messy, such as spaghetti, pasta dishes, stews, casseroles, salads, meat and gravy combinations and so forth, where spillage is sometimes a problem" (page 1, second paragraph). The container has an SSI rigidity, as defined in the present specification, of at least 500 grams at 0.5 inch deflection. Also, the paperboard blank from which the dish is formed has about 60 to about 90 radial scores.

Appealed claims 1-6, 9-38, 50-86, 108 and 109 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Marx. Claims 21-38 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Marx in view of Sandstrom.

We have thoroughly reviewed the respective positions advanced by appellants and the examiner in reaching the decision outlined below.

We will not sustain the examiner's rejections of all the appealed claims which contain the recitation of an SSI rigidity of at least 500 grams at 0.5 inch deflection, i.e., all the claims with the exception of claim 109 which contains no such limitation.

As emphasized by appellants, Marx, although disclosing a deep dish disposable container much like the one claimed, provides no teaching or suggestion of containers having the claimed rigidity of at least 500 grams at 0.5 inch deflection. Marx specifically discloses that "[a] comparable 9 inch plate produced in accordance with the invention has rigidity in the range of 140 gms to 280 gms/0.5 inch deflection depending on the paper weight used and the number of score lines" (column 10, lines 33-37). Manifestly, the lower limit for the claimed rigidity range is substantially greater than the upper limit of the range disclosed by Marx. In general, it is not a matter of obviousness for one of ordinary skill in the art to optimize a value outside a range disclosed by the prior art.

The examiner states that it would have been obvious for one of ordinary skill in the art to provide the claimed rigidity "to provide the desired test for the container" (page 4 of Answer, first paragraph), but the examiner points to no teaching in Marx for obtaining a rigidity value considerably beyond the range disclosed by Marx. Also, while the examiner states that "the claims must be distinguished from the prior art in term [sic, terms] of structure rather than function" (id.), the claimed rigidity is a property of the claimed structure that cannot be ignored by the examiner.

The examiner also points to the different tests employed by Marx and appellants to determine the rigidity of the deep dish container. However, the examiner has provided no substantive analysis of the two tests which would indicate that the tests would yield substantially different values for the same property, namely, rigidity at 0.5 inch deflection. Appellants, on the other hand, have reasonably shown that the tests for measuring rigidity at 0.5 inch deflection are substantially the same (see page 3 of Reply Brief, last paragraph, through page 4). While the examiner asserts that "[i]f the results were of the same test than the performance of Marx would have been similar to that of applicant's" (page 7 of Answer, lines 6-7), the examiner has

provided no factual basis for the conclusion. Also, while the examiner states that appellants have failed to show criticality for the claimed range, no showing of criticality is required in the absence of a prima facie case of obviousness.

Inasmuch as Sandstrom is applied by the examiner for providing inorganic pigment, it does not remedy the deficiency of Marx set forth above.

We will sustain the examiner's § 103 rejection of claim 109 for essentially those reasons expressed by the examiner. As noted above, claim 109 does not recite the rigidity of the deep dish. Claim 109 does recite that the paperboard blank which forms the container has from about 60 to about 90 radial scores. However, as explained by the examiner, the claimed range for scores falls directly within the range for score lines disclosed by Marx, i.e., between 10 and 100 (column 6, lines 21 et seq.). Like the examiner, we find that appellants have not established unexpected results for the narrower range that is encompassed by the range of Marx. We do not subscribe to appellants' argument that Marx teaches to minimize the number of score lines and, therefore, teaches away from the claimed range. The prior art disclosure of a range that totally embraces a narrower range cannot be said to teach away from the narrower range. Clearly, a

significant portion of the prior art range is significantly greater than values within the claimed range. Marx' teaching that the fewer score lines the more rigid the container is not a teaching away from using a number of score lines that is directly within the disclosed range. Indeed, Table 8 of the present specification, relied on by appellants, generally demonstrates the relationship disclosed by Marx. For instance, paperboard blanks having 60 and 90 scores are less rigid than a paperboard blank having 48 scores. Also, appellants have not established the statistical significance of the limited data appearing in Table 7 regarding the standard deviation in rigidity. Moreover, it is appellants' burden to establish that the specification results would be considered truly unexpected by one of ordinary skill in the art, and no such showing has been made. In re Merck & Co., 800 F.2d 1091, 1099, 231 USPQ 375, 381 (Fed. Cir. 1986); In re Klosak, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972).

In conclusion, based on the foregoing, the examiner's rejection of claims 1-6, 9-38, 50-86 and 108 is reversed; whereas the rejection of claim 109 is sustained. Accordingly, the examiner's decision rejecting the appealed claims is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED-IN-PART

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